DOCUMENT RESUME

ED 253 036 EC 171 371

TITLE	A Guide for Impartial Hearing Officers. Preparing and Conducting Impartial Hearings on the Educational Evaluation, Classification and Placement of Children with Handicapping Conditions.
INSTITUTION	New York State Education Dept. Albany. Office for the Education of Children with Handicapping Conditions.
REPORT NO	NYSED-84-7421
PUB DATE	Sep 84
NOTE	71p.
PUB TYPE	Guides - Non-Classroom Use (055)
EDRS PRICE	MF01/PC03 Plus Postage.
DESCRIPTORS	*Arbitration; *Disabilities; *Due Process; Elementary Secondary Education; Handicap Identification; *Hearings; Parent School Relationship; Student Evaluation; Student Placement
IDENTIFIERS	*Hearing Officers; *New York

ABSTRACT

The manual provides guidelines for persons in New York State serving as hearing officers to resolve disagreements regarding the identification, evaluation, and provision of special education services and programs for pupils with suspected educational handicaps. Part I presents an overview of federal and state laws and regulations governing the education of all handicapped children, and a description of the administrative procedures governing identification, evaluation, and programing for pupils with suspected handicaps. Due process is also examined, as is the role of the hearing officer in terms of potential issues (such as questions over the appropriateness of an individual evaluation or program placement). Part II is designed as a guide to help the hearing officer prepare, conduct, and conclude the decision. Part III examines the use of evidence during the hearing, while part IV details qualifications and skills of hearing officers. The appendices include a glossary of terms, an information checklist, and a brief annotated bibliography. (CL)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

U.S. DEPARTMENT OF EDUCATION
NATIONAL INSTITUTE OF EDUCATION
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

X This document has been reproduced as received from the person or organization originating it.

☐ Minor changes have been made to improve reproduction quality.

• Points of view or opinions stated in this document do not necessarily represent official NIE position or policy.

4648

"PERMISSION TO REPRODUCE THIS MATERIAL HAS BEEN GRANTED BY

R. Trombly

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

ED253036

A GUIDE FOR PARENT ADVISORS

PREPARED AND DISTRIBUTED BY THE EDUCATIONAL EMPLOYMENT CLASSIFICATION AND PLACEMENT OF CHILDREN WITH HANDICAPPING CONDITIONS

EC171371

A GUIDE FOR IMPARTIAL HEARING OFFICERS

Preparing and Conducting Impartial Hearings on the Educational Evaluation, Classification and Placement of Children with Handicapping Conditions

The State Education Department does not discriminate on the basis of age, color, creed, disability, marital status, veteran status, national origin, race, or sex in the educational programs and activities which it operates. This policy is in compliance with Title IX of the Education Amendments of 1972. Inquiries concerning this policy may be referred to the Department's Affirmative Action Officer, Education Building, Albany, NY 12234.

The University of the State of New York
THE STATE EDUCATION DEPARTMENT
Office for Education of Children with Handicapping Conditions
Albany, New York 12234
September 1984

THE UNIVERSITY OF THE STATE OF NEW YORK

Regents of The University (with years when terms expire)

1988	Willard A. Genrich, Chancellor, LL.B., L.H.D., LL.D., Litt. D., D.C.S., D.C.L., Sc.D	Buffalo
1987	Martin C. Barell, Vice Chancellor, B.A., I.A., LL.B., LL.D.	Muttontown
1986	Kenneth B. Clark, A.B., M.S., Ph.D., LL.D., L.H.D., D.Sc.	Hastings on Hudson
1989	Emlyn I. Griffith, A.B., J.D.	Rome
1991	Jorge L. Batista, B.A., J.D., LL.D..	Bronx
1986	Laura Bradley Chodos, B.A., M.A.	Vischer Ferry
1991	Louise P. Matteoni, B.A., M.A., Ph.D.	Bayside
1988	J. Edward Meyer, B.A., LL.B., L.H.D.	Chappaqua
1987	R. Carlos Carballada, B.S., L.H.D., D.Sc.	Rochester
1988	Floyd S. Linton, A.B., M.A., M.P.A., D.C.L..	Miller Place
1988	Salvatore J. Sclafani, B.S., M.D.	Staten Island
1989	Mimi Lieber, B.A., M.A.	Manhattan
1985	Shirley C. Brown, B.A., M.A., Ph.D.	Albany
1990	Robert M. Best, B.S..	Binghamton
1990	Norma Gluck, B.A., M.S.W., LL.D.	Manhattan
1990	Thomas R. Frey, A.B., LL.B.	Rochester

President of The University and Commissioner of Education
Gordon M. Ambach

Executive Deputy Commissioner of Education
Robert J. Maurer

Deputy Commissioner for Elementary, Secondary and Continuing Education
Gerald L. Freeborne

Assistant Commissioner for Education of Children with Handicapping Conditions
Lawrence C. Gloeckler

CONTENTS

	Page
INTRODUCTION	1
PART 1: OVERVIEW	
Legal Environment	3
Concepts and Terms	5
Obligations of the School District	10
Due Process Requirements	13
Events in the Development of an Educational Program	14
Role of the Hearing Officer	16
Summary	18
PART II: ADMINISTERING IMPARTIAL HEARINGS	
Prehearing Preparations	19
Conducting the Hearing	24
Receipt of Formal Testimony	28
Unexpected Situations	29
Concluding the Hearing	30
Hearing Checklist	31
Post-Hearing Activities	35
PART III: USE OF EVIDENCE	42
PART IV: IHO QUALIFICATIONS, SKILLS AND INFORMATION	47
Facilitating Communication	49
Stipulations	54
APPENDICES	
Glossary of Terms	59
Information Checklist	62
Annotated Bibliography	65

ACKNOWLEDGEMENTS

This guide was prepared by the Office for Education of Children with Handicapping Conditions of the New York State Education Department, with the assistance of the National Center for Collaborative Planning and Community Services of Watertown, Massachusetts.

Additionally, four practicing impartial hearing officers (IHOs) contributed greatly to the development of this manual:

- Jeffrey D. Smith is Director of Human Resources, Division of Human Resources, BOCES of Southern Westchester County, and an Impartial Hearing Officer (IHO) for local school districts including the City of New York.

- William L. Smith is a school psychologist, and has been chairperson of a Committee on the Handicapped (COH), a college professor, Director of Pupil Services in the Webster Central School in Webster, New York and has served as an IHO for school districts in central New York State. He is currently Director of Special Education for a school district in the State of Idaho.

- Frank Eckelt is an Associate Professor in the Department of Educational Administration and Supervision at State University of New York College at New Paltz. He is a former John Hay Fellow at Harvard University and was recipient of the Founder's Day Award for outstanding scholarship at New York University. He serves as an IHO in the Hudson Valley area of New York State.

- Paul Newman is in private legal practice and serves as an IHO for local school districts and counties in the Onondaga area. He was formerly Assistant County Attorney for Onondaga County for health and mental health hearings.

A special thanks is also extended to Bruce Gelbard, Chief Administrator of the New York City Hearing Office and to the New York City Board of Education for their assistance in providing materials and ideas which have been incorporated in this manual.

The Department expresses its sincere appreciation to all of the above.

Introduction

This manual provides guidelines for persons who may be serving as hearing officers to resolve disagreements regarding the identification, evaluation, and provision of special education programs and services for pupils who are thought to be educationally handicapped. It is written as a complement to the hearing officer training program conducted by the State Education Department. In conformance to Chapter 829 of the Laws of 1984, individuals appointed by a Board of Education to be impartial hearing officers must be selected from a State-approved list of officers certified through completion of State training. This manual provides additional information to training program participants and serves as a reference subsequent to successful completion of the program.

Part I of the manual presents an overview of Federal and State law and regulation governing the education of all handicapped children, and a description of the administrative procedures which govern the process of identifying, evaluating and programming for pupils who are thought to be handicapped. The concluding section of Part I presents an overview of the right to Due Process which Boards of Education must provide. With this overview, the role of the hearing officer is also outlined in the context of possible issues that may precipitate a formal hearing as well as those which may surface during such a hearing.

Part II of the manual is designed as a hearing officer's guide to prehearing preparation, the conduct of the hearing and the conclusion of the hearing, including the formulation of the decision.

Part III provides a discussion of hearing officer skills and information.

PART I: OVERVIEW

LEGAL ENVIRONMENT

Federal Law

The Federal presence in education for the handicapped stems from several court decisions which established constitutional protections to handicapped persons. These cases were grounded in the Fourteenth Amendment to the United States Constitution, which states in part:

> "... nor shall any state deprive any person of life, liberty or property without due process of law, nor deny any person within the jurisdiction, equal protection of the laws."

The famous landmark case of Brown v. The Board of Education, decided in 1954, established the principle that, although education was a matter left to the states under the U.S. Constitution, once a state undertook to provide public education, constitutional protection was afforded the recipients. Particular emphasis was placed on the Fourteenth Amendment requirement of "equal protection" by the states.

Seventeen years later, in Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania, the state conceded in a pretrial hearing that excluding retarded children from the educational system violated the Constitution, and that the state had a duty to provide the children with appropriate education and training.

One year following the PARC case, the Federal court for the District of Columbia extended the principle to all handicapped children. Mills v. Board of Education also established the right of due process for those excluded from education and further found that the school district could not deny constitutionally protected rights on the basis of insufficient funds.

Responding to the national policy issues raised by these cases, Congress enacted the "Education for All Handicapped Children Act of 1975" (20 USC 1401 et seq). Popularly known as P.L. 94-142, the Act mandates several broad principles applicable to education for the handicapped. These principles, as elaborated by subsequent court decisions, include:

- School districts have an affirmative duty to locate, identify and evaluate children, within their jurisdiction, who may be handicapped.
- All school-age handicapped children must receive a free appropriate public education including necessary related services.
- This program must be contained in a written, goal-oriented document called an "Individualized Education Program," the contents of which must be agreed to by the parents.

- o There must be an opportunity for meaningful parent participation in decisions regarding the child.

- o Parents must be informed of their rights, which include an opportunity for administrative review of the school district's decision.

With respect to the latter principle, if parents choose not to exercise their rights, the school district must be able to demonstrate and document vigorous attempts to gain parental involvement.

Many requirements of P.L. 94-142 are reinforced by regulations implementing Section 504 of the Rehabilitation Act of 1973 (29 USC 794).

New York State Law

A free public education is mandated by the New York State Constitution. Among the statutes which implement this constitutional provision is Section 3202 of the Education Law which requires that a free public education be provided all children between 5 and 21 years of age who have not received a high school diploma.

Specific provisions addressing the responsibility of school districts for the education of the handicapped are found in Article 89 of the Education Law. Although some sections of Article 89 date to 1910, its major provisions stem from amendments enacted in 1976 and 1980. Chapter 853 of the Laws of 1976, like Federal statutes, requires that handicapped children receive a free appropriate public education and sets forth both State and local responsibilities for the education of handicapped children. The later amendments provided for program funding, along with minor changes.

To implement its statutory mandates, the Legislature required that the Department of Education "... formulate such rules and regulations pertaining to the physical and educational needs of such children as the Commissioner of Education shall deem to be in their best interests."

Part 200 of Title 8 of the Official Compilation of Codes, Rules and Regulations of the State of New York (cited as 8 NYCRR Part 200) was developed in response to this mandate. That part provides the framework for school district compliance with both State and Federal statutes. Part 200, as promulgated by the Regents to become effective July 1, 1984, includes the following sections:

Section 200.1 defines the terms and phrases used in the regulations. Sections 200.2 through 200.6 regulate specific Board of Education and Committee on the Handicapped responsibilities, procedures for referral, evaluation, individualized education program development, placement and review, procedural due process and the establishment of a continuum of services and programs for pupils who are found to be educationally handicapped. Section 200.7 prescribes program standards for nonpublic schools to be approved for the education of pupils with handicapping conditions. Sections 200.8-200.10 regulate accounting, fiscal reporting and reim-

bursement procedures related to the education of handicapped children. Section 200.11 regulates the procedures for admitting to public schools children residing in facilities of the Office of Mental Hygiene and the Office of Mental Retardation and Developmental Disabilities. Section 200.12 provides for State assistance for transportation. Finally, Section 200.13 deals with autistic children pursuant to Chapter 410 of the Laws of 1978 requiring separate regulations for these pupils. Section 200.14 prescribes the programs and services to be provided by a district which elects not to implement Section 200.6 during the 1984-85 and/or 1985-86 school years. Beginning July 1, 1986, all school districts shall operate their programs pursuant to Section 200.6.

CONCEPTS AND TERMS

The following is a glossary of selected concepts and terms found in law and regulation. Familiarity with these terms is essential to an understanding of the roles, rights and responsibilities of Boards of Education, school district officials, and the parents of children thought or found to be handicapped.

Referral and Evaluation

Referral is a written notice to the chairperson of the Committee on the Handicapped or the school building administrator stating that a pupil is believed to be handicapped and giving reasons for the belief.

Individual Evaluation means any procedures, tests or assessments used selectively with an individual child, including a physical examination in accordance with the provisions of Section 904 of the Education Law, an individual psychological evaluation, a social history and other suitable examinations and educational evaluations as may be necessary to determine whether a child is handicapped and the extent of his or her special education needs, but does not include basic tests administered to, or procedures used with, all pupils in a school grade or class.

Independent Evaluation is an individual evaluation of a pupil thought to be handicapped conducted by a person who is not employed by the public agency responsible for the education of the pupil.

Pupil with a Handicapping Condition

A pupil with a handicapping condition is a child who has not received a diploma or attained the age of 21 prior to September 1, who is entitled to attend public schools and who, because of mental, physical or emotional reasons has been identified as having a handicapping condition and is provided access to appropriate special services and programs. The range of classifications is as described below:

Mentally Retarded means a pupil who, concurrent with deficits in adaptive behavior, consistently demonstrates general intellectual functioning that is determined to be 1.5 standard deviations or more below the mean of the general population on the basis of a comprehensive evaluation which includes an individual psychological evaluation.

Emotionally Disturbed means a pupil with an inability to learn which cannot be explained by intellectual, sensory or health factors and who exhibits one or more of the following characteristics over a long period of time and to a marked degree:

- An inability to build or maintain satisfactory interpersonal relationships with peers and teachers,
- Inappropriate types of behavior or feelings under normal circumstances,
- A general pervasive mood of unhappiness or depression,
- A tendency to develop physical symptoms or fears associated with personal or school problems.

Deaf means a pupil with a hearing impairment which is so severe that the pupil is impaired in processing linguistic information through hearing, with or without amplification, which adversely affects educational performance.

Hard of hearing means a pupil with a hearing impairment, whether permanent or fluctuating, which adversely affects the child's educational performance but which is not included under the definition of "deaf."

Speech Impaired means a pupil with a communication disorder, such as stuttering, impaired articulation, a language impairment, or a voice impairment, which adversely affects the child's educational performance.

Visually Impaired means a pupil with a visual handicap which even with correction adversely affects a child's educational performance. The term includes both partially seeing and blind children.

Orthopedically Impaired means a pupil who is physically handicapped and who has a severe orthopedic impairment which adversely affects the child's educational performance. The term includes impairments caused by congenital anomaly (e.g., clubfoot, absence of some member, etc.), impairments caused by disease (e.g. poliomyelitis, bone tuberculosis, etc.) and impairments from other causes (e.g., cerebral palsy, amputation, and fractures or burns which cause contractures.)

Other Health Impaired means a pupil who is physically handicapped and who has limited strength, vitality or alertness, due to chronic or acute health problems such as a heart condition, tuberculosis, rheumatic fever, nephritis, asthma, sickle cell anemia, hemophilia, epilepsy, lead poisoning, leukemia, diabetes, or Tourette syndrome which adversely affects the pupil's educational performance.

Autistic means a pupil with a behaviorally defined syndrome which occurs in children of all levels of intelligence. The essential features are typically manifested prior to 30 months of age and include severe disturbances of

Other Health Impaired means a pupil who is physically handicapped and who has limited strength, vitality or alertness, due to chronic or acute health problems such as a heart condition, tuberculosis, rheumatic fever, nephritis, asthma, sickle-cell anemia, hemophilia, epilepsy, lead poisoning, leukemia, diabetes, or Tourette syndrome which adversely affects the pupil's educational performance.

Speech Impaired means a pupil with a communication disorder, such as stuttering, impaired articulation, a language impairment, or a voice impairment, which adversely affects the child's educational performance.

Visually Impaired means a pupil with a visual handicap which even with correction adversely affects a child's educational performance. The term includes both partially seeing and blind children.

Continuum of Services and Programs

Free Appropriate Public Education (FAPE) is a specially designed program of special education or related services which is described in an individualized education program and provided for a handicapped pupil by a public agency at no cost to the parent or the pupil.

Least Restrictive Environment (LRE) means that placement of an individual handicapped pupil which provides the special education needed by the pupil, provides for education of the pupil to the maximum extent appropriate with other pupils who are not handicapped and is determined following consideration of the proximity of the placement to the pupil's place of residence.

Special Education means specially designed individual or group instruction or special services or programs provided at no cost to the parent, to meet the individual needs of pupils with handicapping conditions.

Individualized Education Program (IEP) is a written plan which specifies the special education programs and services to be provided to meet the unique educational needs of a pupil with a handicapping condition.

PROGRAMS AND SERVICES

Regular Education Classes and Services are provided for pupils with handicapping conditions who do not require individualized or group instruction in special education for all or part of the school day. The appropriate regular classes and services must be indicated on the pupil's IEP.

Transitional Support Services means temporary services provided to a regular or special education teacher to aid in the provision of appropriate services to a pupil identified as handicapped, who is transferring to a less restrictive environment, as specified in the pupil's Individual Education Program (IEP).

Related Services means speech pathology, audiology, psychological services, physical and occupational therapy, counseling services, other appropriate support services, and medical evaluation or diagnostic services. These services are provided in order for the child to benefit from the education program.

Resource Room Program means a special education program that provides specialized supplementary instruction in an individual or small group setting for a portion of the school day for a handicapped pupil registered in either a regular or special class.

Special Class means a class consisting of pupils with the same handicapping conditions or with differing handicapping conditions who have been grouped together because of similar educational needs for the purpose of being provided a special education program. A special class provides primary instruction on a daily basis.

PLACEMENT

Public School District - The size of the district and the number of students with handicapping conditions usually determines the extent of special education. Smaller districts, may contract with other districts or agencies. Local public schools are responsible to arrange for necessary programs and services in neighboring districts if nothing comparable can be provided within a given district's jurisdiction.

Boards of Cooperative Educational Services (BOCES) - Local public schools contract with BOCES in conjunction with neighboring districts for special education and occupational programs. BOCES-supervised programs may be located in a central BOCES facility and/or may be housed in local public schools.

Home/Hospital Setting - Some students with handicapping conditions need temporary instruction at home or in a hospital setting due to severe illness or special circumstances indicated on the IEP. The instructional program should be appropriate for the student's needs.

Special Day School - In this setting, special education is the focus of the total school. The participation of nonhandicapped children is infrequent. Large districts may have such schools for the instruction of children with handicapping conditions. There are also special day schools which are private facilities.

Residential School - Private and public agencies operate educational programs for handicapped children that include residential components. Public schools may contract or recommend services in this type of setting, if appropriate, and if the school is approved by the State Education Department.

Review

Review. The Committee on the Handicapped is responsible for conducting a review of the status of each handicapped pupil on at least an annual basis. It is the purpose of a review to develop recommendations regarding the continuation, modification or termination of classification or program placement of the pupil.

Change in Placement. The regulations define this as the transfer of a pupil to or from a public school, BOCES, school enumerated in Articles 81, 85, 87, 88, or 89 of the Education Law, chapter 566 of the laws of 1967, or an approved nonpublic school.

Due Process

Notice means written statements in English and translated, when appropriate, into the dominant language or mode of communication of the parent's home which:

- Describe the action proposed to be taken by the school district or the Committee on the Handicapped on behalf of a child thought to be handicapped,
- Describe any other options considered and explain why the proposed action was selected,
- Describe each evaluation, procedure, test, record, or report and any other factors upon which the proposed action was based.

Consent is a written statement from the parent acknowledging that:

- The parent has been fully informed, in his or her dominant language, or other mode of communication, of all information relevant to the activity for which consent is sought.
- The parent has been notified of the records of the pupil (if any) which will be released and to whom they will be released.
- The parent agrees in writing to the activity for which consent is sought.
- The parent understands that consent for the preplacement evaluation and initial placement is voluntary and may be reconsidered at any time.

Formal Impartial Hearing is a hearing that may be initiated by either the parent or the school district, should disagreement arise as to the recommendations made by the Committee on the Handicapped or action of the Board of Education; or should the parents or guardian refuse to give consent to the recommended programs or evaluation.

Impartial Hearing Officer is an individual assigned by a Board of Education to preside at a formal hearing and render a decision. An impartial hearing officer shall be independent, not an officer, employee, or agent of the school district or of the BOCES of which such school district is a component, or an employee of the Education Department. He or she shall not have a personal or professional interest which would conflict with his or her objectivity in the hearing and shall not have participated in any manner in the formulation of the recommendation sought to be reviewed.

Appeal is a review, by the Commissioner of Education, of the decision of an impartial hearing officer initiated by the parent and/or Board of Education pursuant to the provision of Section 4404 of the Education Law.

OBLIGATIONS OF THE SCHOOL DISTRICT

The constitutional and statutory mandates of a free public education are focused upon the local school district. Here the broad mandates must be translated into concrete acts. So too, the statutory requirements surrounding education for the handicapped find their focus at the local level.

Board of Education

To ensure that no handicapped child is denied access to public education, each school district Board of Education is required to perform certain duties. The Board must:

- Locate and identify all handicapped children in the district who are eligible to attend public school during the next school year.
- Assure the maintenance of a current register containing the names of these handicapped children, the nature of their suspected handicapping conditions, and the educational placement, if any, of the children.
- Prepare a district plan addressing current special education resources, projected needs within a three-year span and strategies for addressing such needs.
- Provide for the preparation of an individualized education program for each handicapped pupil who is eligible for a free public education.
- Determine the most reasonable and appropriate special service or program for such a pupil in the least restrictive environment.
- Provide written notice of its determination to the pupil's parents.
- Furnish appropriate educational opportunities for handicapped pupils by furnishing such special services and programs as are needed by the individual pupil.

- Provide suitable transportation to and from special classes and programs, with the exception of residential facilities for the care and treatment of children with handicapping conditions under the jurisdiction of an agency of the State other than the State Education Department.

- Notify the Commissioner of Education if the Board cannot secure an appropriate special service or program within the State to meet the needs of the pupil.

- Maintain a summary of child data on file in the school district and submit such summaries to the State Education Department as required.

- Insure the confidentiality of personally identifiable information pertaining to all children.

- Make available a list of public or private agencies and other resources from which a parent or legal guardian may obtain an independent evaluation of the child, as well as low cost legal or other services.

- Maintain a list of individuals willing to appear as surrogate parents and appoint a surrogate parent when appropriate.

- Maintain a list of persons from which the district will appoint an impartial hearing officer. Appoint an impartial hearing officer to hear an appeal by the parents or guardians of a child regarding the timeliness or nature of the recommendation of the Committee on the Handicapped or the determinations of the Board.

- Establish written policies which:

  a. Establish practices and procedures to ensure that pupils with handicapping conditions have the opportunity to participate in school district programs, including extracurricular activities.

  b. Establish practices and procedures for the appointment and training of personnel to carry out the functions identified in the regulations, including impartial hearing officers.

An additional, and highly important, requirement is that the Board of Education appoint a Committee on the Handicapped (COH). This Committee, appointed by resolution of the Board, must include at least four members: a school psychologist, a school physician, a teacher or administrator of special education and a parent of a handicapped child residing in the district.

Committee on the Handicapped

The COH is central to the process through which a handicapped child is provided an education appropriate to his/her needs. The specific duties of the COH are:

- To submit recommendations to the Board of Education regarding the establishment of subcommittees as provided by the Commissioner's Regulations.

- To maintain and update the register of all handicapped pupils residing in the district.

- To identify, review and evaluate at least annually the status of each handicapped child, and each child thought to be handicapped, who resides within the school district and is eligible to attend public school; to obtain written parental consent for initiation of an individual evaluation for the purpose of ascertaining the physical, mental, emotional and cultural-educational factors which may contribute to the handicapping condition and which bear on the child's progress.

- To recommend appropriate educational programs and placements to the child's parent and the Board of Education within timelines specified in 8NYCRR in 200.4(c) of the Regulations; to recommend the continuation, modification or termination of special class or program placements; to furnish the Board of Education with a written evaluation setting forth the reasons for COH recommendations.

- To inform parents of their opportunity to participate in the development of the IEP Phase I and to address the Committee regarding the pending recommendations; to provide the parents of the child written prior notice of its recommendation that the Board of Education modify, continue or change the identification, evaluation or educational placement of the child; to notify parents of their right to due process and their right to an independent evaluation.

- Recommend transportation and related services needed by the student.

- To obtain written parental consent prior to the child's entrance into a special education program for the first time; to arrange for the completion of the IEP in the agreed setting pending final placement.

- To advise the Board of Education concerning the nature and schedule of reevaluations of handicapped children provided, however, that each child in a special class be reexamined by qualified appropriate school personnel at least once every three years.

- To make or to have made periodic (at least annual) evaluations of the adequacy of programs, services and facilities for handicapped children.

- o To report at least annually to the Board of Education on the status of programs, services and facilities made available by the school district and to keep such reports on file for inspection by State Education Department officials.

- o To assist the Board in sending information pertaining to a handicapped child to the child's home district in cases where that district has contracted for the child's education.

DUE PROCESS REQUIREMENTS

The previous section outlined those activities which a Board of Education must undertake, either on its own or through its Committee on the Handicapped. Several of those activities represent decisions which stimulate actions which may have major impact on the future of a child. Accordingly, the law provides that the parents of the child must be afforded due process with respect to these decisions. The term due process - within the context of education for the handicapped - generally involves four key concepts:

1. Parents must receive written notice of certain decisions prior to their being carried out;

2. Parents must be afforded participation in the decision-making;

3. Parents may provide, withhold or revoke their written consent to certain actions before they are carried out; and

4. Parents may contest decisions through informal conferences, impartial hearings, appeals to the Commissioner of Education and review by the courts.

Due process does not require that parents have an absolute veto over a proposed action. Rather, due process ensures that parents will have a major and meaningful role in those processes affecting their child. The various levels of review are established to provide for the best interest of the child when the views of parents and educators diverge.

The hearing officer may not only have to decide between divergent views of a proposed action but may also have to determine whether the requirements of due process have been met. When the latter have not been met, there is a serious defect. Therefore, the hearing officer must have a firm grasp of the due process requirements established in law and regulation and how these requirements fit into the overall special education process. The following section outlines the procedures followed in developing an appropriate educational program and illustrates the due process requirements.

EVENTS IN THE DEVELOPMENT OF AN EDUCATIONAL PROGRAM

Referral and Initial Notification

Where a child is thought to have a handicapping condition, a referral is made to either the chairperson of the Committee on the Handicapped or to the administrator, usually the principal of the building where the child attends or is eligible to attend school. The referral may be made by any of several individuals, including:

- o The pupil's parent, or person in parental relationship,
- o A professional staff member of the school district in which the pupil resides or of the school, either public or private, which the pupil attends,
- o A licensed physician,
- o A judicial officer,
- o The commissioner or designee of a public agency with responsibility for the health, education or welfare of children,
- o The pupil, himself or herself, if legally eligible to attend school in the district and 18 years of age or older, or an emancipated minor.

A referral by the pupil's parent, the pupil himself or herself, or a judicial officer must be submitted in written form. A written referral by others must state the reasons for the referral and include any test results, records or reports upon which the referral is based that may be in the possession of the person submitting the referral. It must also describe attempts to remediate the pupils performance prior to referral; and describe the extent of parental contact or involvement prior to the referral.

If the referral is made to the building administrator, that individual must forward the referral to the chairperson of the Committee on the Handicapped immediately.

Where the referral is made directly to the chairperson of the COH, that individual must immediately notify the pupil's parent that an evaluation will be sought for the pupil. A copy of the referral is forwarded to the building administrator within five days.

Where initial referral had been made to the building administrator, with subsequent forwarding of the referral to the COH, the chairperson must notify the parent immediately.

Individual Evaluation

When a pupil who has not previously been identified as handicapped is referred to the COH for an individual preplacement evaluation, the notice which the COH sends the parents must include a request for written parental consent to the evaluation. If the evaluation to be performed is part of a reevaluation or annual review of a pupil already identified as handicapped, notification is required but parental consent is not.

If consent is requested, but not granted, the COH chairperson informs the parent that, upon request, the parent will be given an opportunity to attend an informal conference with the Committee or designated professionals most familiar with the proposed evaluation and counsel or an advisor of the parent's choice. At the informal conference, the parent will be afforded the opportunity to ask questions regarding the proposed evaluation. If at the conference the parent and the person initiating the referral agree in writing that the referral is not warranted, the referral will be withdrawn and a copy of the agreement placed in the pupil's cumulative educational record file. If the parent does not request or attend such a conference, or continues to withhold consent for evaluation for a period of 30 days after the date of receipt of the referral, the COH will document attempts made to obtain parental consent and will request that the Board of Education initiate an impartial hearing. In this instance, the hearing officer will be asked to decide whether an evaluation is warranted.

If the parent disagrees with the evaluation conducted by the school district, he or she should so advise the district prior to seeking an independent evaluation. Upon request, the district is then required to provide the parent with a list of persons or agencies which can provide the independent evaluation; however, the choice of who conducts the evaluation rests with the parent. The independent evaluation is conducted at public expense unless:

- The district initiates an impartial hearing to show that its evaluation is appropriate, and
- The hearing officer's decision is that the evaluation was appropriate.

If the hearing officer determines that the district's evaluation was appropriate, the parent may still obtain an independent evaluation but at parental expense.

An evaluation is, therefore, initiated by the COH either on receipt of the parents' written consent or after a decision of the hearing officer, or an appellate body such as the Commissioner or the courts, that the evaluation is warranted.

Recommendations of the COH

Upon completion of the evaluation, and with every effort to ensure participation of the parent in its review, the COH should complete its recommendations to the Board of Education. Written notice, providing details of the recommendations should be sent to the pupil's parents. Where the pupil will be entering a special education program for the first time, the notice should also request written

consent to the actions proposed in the recommendations. Sections 200.5(a)(4)(ii) and 200.4(c)(2) of the regulations provide detail on the specific contents of the notice. After receipt of this notice, a parent may request an impartial hearing if he or she disagrees with the COH recommendation.

For a pupil not previously identified as having a handicapping condition, the Committee on the Handicapped must provide a recommendation to the Board within 30 days of the date of receipt of consent, or within 40 days of the date of receipt of referral, whichever occurs first. For a handicapped student referred for review, a recommendation must be provided within 30 days. Parents may seek an impartial hearing if timelines are not adhered to.

Action by the Board of Education

The Board of Education may reject, modify, or adopt the recommendations of the COH and must notify the parents of their action. Parents may also request an impartial hearing to review the Board's action.

If the recommendations are not acted on within 30 days of their receipt by the Board, parents may similarly request an impartial hearing.

As noted above, when a student is to enter special education for the first time, written parental consent to the recommendations of the COH is required. If consent is withheld for a period of 30 days following notification, the Board of Education must initiate the impartial hearing process. In such a case, the hearing officer would review the proposal, and if the activities proposed are appropriate, order the placement of the pupil in the recommended program.

ROLE OF THE HEARING OFFICER

Compliance with the law and regulations by a Board of Education or a Committee on the Handicapped requires those bodies to make basic and far-reaching decisions about a child, many of which may have an impact well into the child's future. As a result, most parents will have a great interest in these decisions and in their implementation. Although the law provides that parents be afforded meaningful participation in decisions made by the educational system, the law cannot guarantee agreement between parent and educator. An impartial hearing serves as a mechanism whereby the differences between parents and schools may be resolved.

Central to the impartial hearing is the impartial hearing officer (IHO) whose role is to hear and resolve issues which may arise between the parents and the school district. The IHO is not a judge in the strict sense. He or she makes a decision, however, which may have a long-range effect on a child. Like the decision of a judge, the decision of an IHO is binding, unless overruled by an appeal to higher bodies. The activities of the hearing officer must be undertaken within a specific statutory or regulatory context. The IHO cannot, for example, find a law or regulation unconstitutional. Rather, it is the function of the hearing officer to

determine the degree to which one or more parties have complied with the law or regulation. Unlike a judge, the hearing officer must be a determined fact-finder. It is the IHO's responsibility to get all the facts germane to an issue and then apply law and regulation to the issue. The IHO, while conducting a hearing, should not simply sit back and decide the issue upon the written evidence set forth by the parties. Rather, he or she should take an active role in the process of eliciting testimony from witnesses to ensure that all facts are presented. In addition, the IHO may be required to go beyond a simple choice between the proposals of the parties. Neither party may be proposing an appropriate resolution and the IHO may have to arrive at an alternative solution which is appropriate for the needs of the pupil, provided the decision is based upon the evidence and testimony entered into the record of the hearing.

The primary issues which may precipitate a hearing pertain to a proposed or actual evaluation, classification, program or placement of the pupil. Presented below is an outline illustrating the range of potential issues which may be brought forward for resolution by the hearing officer.

The appropriateness of an individual evaluation, based on:

- Whether an individual evaluation is warranted,
- Whether the proposed or actual evaluation is sufficient in scope and depth, is timely, nonbiased and in the case of independent evaluations, to be without cost to the parent.

The appropriateness of a pupil's classification, based on:

- Whether classification as handicapped is warranted,
- Whether the proposed or actual classification is valid and supported by the evaluation.

The appropriateness of a program placement, based on:

- Whether the initiation of special programs and services is warranted,
- Whether the proposed or completed IEP is adequate and in keeping with the pupil's educational needs,
- Whether the pupil's individual needs are similar to the other pupils' with whom he or she has been placed for special education.
- Whether the proposed or actual placement is in keeping with the pupil's IEP.

Also, in the course of a hearing, a number of secondary issues may be brought forward by either party which the hearing officer must weigh in making an appropriate determination. Such issues generally pertain to the provision of appropriate administrative and due process procedures and occasionally to the impartiality of the hearing officer. Specifically, such issues may relate to:

- o Proper notice,
- o The opportunity to give, withhold or reconsider consent,
- o Procedural timeliness,
- o The right to a formal hearing by an impartial hearing officer, including:
  - o The relationship of the hearing officer to the parties involved,
  - o The manner in which the hearing is conducted, or
  - o The personal or professional biases of the hearing officer.

SUMMARY

Part I of this handbook has presented a background of definitions and information regarding law, regulation, policy and procedure governing the evaluation, classification and placement of pupils with handicapping conditions. The role of the hearing officer, including an outline of the various issues with which he or she may be faced, was also discussed. Parts II, III and IV attend to the subjects of administering formal hearings, rules of evidence and qualifications, skills and additional information of importance to the practicing hearing officer.

PART II: ADMINISTERING IMPARTIAL HEARINGS

PREHEARING PREPARATIONS

The impartial hearing is a highly significant aspect of due process afforded to parents in assuring that a free, appropriate education is provided to handicapped children. The responsibility for insuring that a hearing is conducted professionally and impartially is solely that of the hearing officer and, in this capacity, he or she has considerable authority. Decisions of the hearing officer are legally binding on both parents and school districts, and are reversible only by the Commissioner of Education or, upon appeal of a Commissioner's decision, by the courts.

A sound theoretical foundation for conducting a hearing includes familiarity with applicable Federal and State statutes and regulations, in conjunction with a knowledge of issues and concerns in special education. This theoretical foundation should be complemented by a practical foundation — a clear and concise plan of how the hearing will be conducted. As is the case with many activities, the degree to which the hearing moves smoothly will depend on how well the hearing has been planned and the initial steps completed.

Although many Boards of Education will provide assistance with the details of hearing arrangements, this is not always the case. Accordingly, potential hearing officers would be wise to prepare a structured approach to completion of these details in advance.

One proven method of planning is the use of a checklist. This method is particularly appropriate in the case of hearings, since most of the details will be the same from one hearing to the next. In addition to its obvious use as a list of things to do, a well-prepared checklist can also serve as an integral part of the IHO's record of the hearing. It can indicate when certain actions were taken and can serve as an index to supporting documents. A sample checklist which can fill all these functions is shown on pages 22 and 23. The use of such a checklist will ensure that the prehearing arrangements discussed below are completed.

The hearing officer's documentation should begin when he or she accepts a request to serve as an IHO. Because the service as a hearing officer represents a contractual relationship between an individual and a Board of Education, the formal letter of appointment should be specific as to the terms and conditions of the appointment. If it is not, written answers should be sought to any question the potential IHO has before beginning any hearing-related activities.

The letter of appointment from the Board should include the name of the child whose evaluation, classification or educational program and placement is in dispute; the name, address and telephone number of the pupil's parent(s); the contact person in the school district (usually the superintendent of schools or the school attorney); the name of the attorney for the parents (if any), his or her address, and telephone number; and the place available for the hearing. The letter should also indicate which party requested the hearing, the date the request was received and the last day by which a decision should be rendered.

Based on this information, the IHO should be able to estimate the block of time within which the hearing must be held in order to meet the deadline. At this point the newly appointed IHO must begin some fairly intensive activity to arrange the actual dates of the hearing. Some initial contact with the parties may be required to complete these activities.

Although these initial contacts may provide the IHO with insights into the purpose of the hearing and issues likely to be raised, caution should be exercised that such preliminary contacts do not involve discussion of evidence to be presented at the hearing.

Details which should be discussed include:

Need for Interpreters: The hearing officer, either party, or their respective witnesses may require an interpreter for persons to be present who are deaf or do not speak or understand the language spoken at the hearing. The IHO should determine any need for interpreters and make the necessary arrangements.

Date/Time of Hearing: If possible, the IHO should establish a date and time for the hearing that is convenient to all parties, yet allows sufficient post-hearing time for deliberation and preparation of the written decision.

Closed/Open Hearing: Since a hearing is closed to the public unless parents request an open hearing, the parent should be asked if an open hearing is desired.

Rules of Evidence: Each party should understand that evidence is usually submitted and entered in the record according to "relaxed rules of evidence." However, only evidence, the substance of which has been exchanged between the parties at least five days prior to the hearing, is allowed unless, in the course of the hearing, the parties agree to the introduction of new evidence. This is commonly referred to as the "five-day rule of surprise." The IHO should indicate to both parties the necessity of exchanging documentary evidence no later than five days prior to the hearing. Where parents plan to act without counsel, the IHO should be entirely satisfied that they understand the rules of evidence. A relatively small amount of time spent on this point may pay significant dividends at the hearing.

Issuance of Subpoenas: The IHO is authorized to issue subpoenas. Accordingly, the parties should be asked about any subpoenas needed and how they should be served. Usually, the willingness of the witness to appear dictates whether subpoenas are served by mail or by the more authoritative method of personal service.

Informing Parties of Due Process Rights: A verbal overview of due process rights should be provided both parties. Parents should also be reminded of their right to be represented by counsel, if there is no initial indication that they have retained counsel.

Parent Access to Records: If the parents state that they have not been given access to school records, the IHO should allow the parents time to exercise their right of access to these records prior to the hearing.

Once these details have been completed, the IHO should prepare a formal notice of hearing to be sent to each party. The notice should include a description of each party's rights and privileges and confirm any arrangements requested by or made on behalf of the parties, including the use of interpreters, issuance of subpoenas or special arrangements to make the hearing room accessible for those who may be handicapped.

Arrangements for the mechanics of the meeting should also be made at this time. These include:

- o Accommodations: Room, table, chairs, etc., for the hearing, including any modifications to ensure accessibility,
- o A second room, if needed, in which to sequester witnesses,
- o Arrangements for the hearing record: either a stenographer or tape machine. If the latter is chosen, a back-up machine and tape supply should also be secured.

Most school districts will be of great assistance with these aspects of the hearing.

The service of subpoenas upon witnesses should be provided for as soon as the time, date and place for the hearing are set. At this point prehearing preparations are complete and the IHO is ready to prepare the agenda for the hearing and draft an opening statement.

Prehearing Procedures Checklist

In the matter of a hearing

On Behalf of: _____, a pupil thought to be handicapped
(Name of pupil)

Petitioner: _____ **Respondent:** _____

Contact Person: _____ **Contact Person:** _____

Address: _____ **Address:** _____

_____ _____

Phone: _____ **Phone:** _____

Activity or Procedure	Person(s) to Contact	Manner and Date of Contact	Results	Completion Date
1. Receive Notice of Appointment	Board of Education Representative	Dated, written notice from the Board of Education	Accept Appointment	
			Reject Appointment	
2. Determine date by which a decision must be rendered	Board of Education Representative	Dated written notice from the Board of Education	Date by which a decision must be rendered: _____	
3. Address the possible for interpreter (deaf or foreign language)	Petitioner			
	Respondent			
4. Determine mutually acceptable date, time and location for hearing	Petitioner		Date: _____ Time: _____ Location: _____	
	Respondent			
5. Determine whether hearing is to be open (public)	Parent of pupil		Open or Closed	
6. Inform parties of need to exchange evidence (five day rule)	Petitioner			
	Respondent			
7. Determine witnesses to be subpoenaed	Petitioner		Results Attached	_____
	Respondent			

Prehearing Procedures Checklist - continued

Hearing on behalf of _____
(Name of pupil)

Activity or Procedure	Person(s) to Contact	Manner and Date of Contact	Results	Completion Date
8. Formally notify parties of hearing arrangements and due process rights and privileges in accordance with Part 200 of the Regulations	Petitioner	Certified mail, return receipt requested	Copies and receipts attached	
	Respondent	Certified mail, return receipt requested	Copies and receipts attached	
9. Arrange for stenographer	Board of Education Representative			
10. Arrange for interpreter	Board of Education Representative			
11. Issue required subpoenas	Witnesses as requested	By mail or personal service	Results attached	
12. Prepare agenda for hearing	none	NA	Agenda prepared for distribution at hearing	
13. Prepare opening statement	none	NA	Prepared to open hearing	
Notes:				

CONDUCTING THE HEARING

A hearing which reviews the identification, evaluation or placement of a child thought to be handicapped should not be either overly formal or too informal; it is neither a judicial proceeding, nor a round table discussion. Its paramount purpose is to provide an orderly structure and supportive atmosphere within which the parties may present their respective sides of the issue in the most enlightening manner possible. Control of the hearing is critical to accomplishing this end.

One tool which the IHO may find helpful in maintenance of control is an agenda. A written agenda, given to all parties before the hearing begins, helps set a tone of order and structure for the hearing. An outline of a typical agenda is shown below. The actual agenda would include the actual names of parties, witnesses, etc., and dates.

I. Opening Statement

- A. Call to order
- B. Purpose of the hearing
- C. Introduction of the IHO
- D. Procedures of the hearing
- E. Rights of the parties
- F. Introduction of participants for the record

II. Receipt of Formal Testimony and Evidence

- A. Format
- B. Opening statements
  1. By school district representative
  2. By parent or representative
- C. Presentation of testimony and written evidence
  1. School district
     a. Oral testimony
     b. Documentary evidence
  2. Parent
     a. Oral testimony

b. Documentary evidence

III. Closing Statements

A. School district representative

B. Parent or representative

C. IHO

1. Decision date

2. Availability of transcript of the hearing

3. Procedures for appeal

4. Adjournment of the hearing

Before the Hearing is Called to Order

There are some preliminary activities that the IHO can undertake which will help a hearing begin smoothly:

1. Give the legal stenographer his or her name, title, address, telephone number with the instructions that the original transcript shall be sent to the IHO and that a copy be sent to each of the parties. Brief the stenographer on the agenda for the hearing.

2. Inform the legal stenographer of the proper heading for the hearing, for example:

   "In the Matter of the Appeal of (Petitioner's Name and Title) on behalf of (Pupil's Name), from action of (Respondent's Name and Title) of the _____ School District."

3. Assign the responsibility for hearing details such as swearing of witnesses and marking of evidence. Some IHO's may prefer to handle these tasks personally, while others prefer that they be done by the legal stenographer. Both IHO and stenographer should understand who has the responsibility for the completion of each task.

4. If a tape recorder is used, identify the person in charge of the machine to ensure changing the tape and the proper functioning of the tape recorder. If possible, the stenographer who is to transcribe the recording should be present.

5. Indicate to the stenographer and the parties involved the seating arrangement at the hearing.

6. Mark exhibits and arrange them in chronological order.

Opening the Hearing

The hearing should begin promptly at the time indicated in the notice of hearings if the parties are present and ready to proceed. If all participants are not present, a reasonable leeway should be allowed for transportation difficulties.

An opening statement by the IHO will help the parties understand the nature of the hearing and its procedure, and will help set a tone for the hearing. The content of the IHO's opening statement will vary according to the parties at the hearing. For example, if both parties are represented by attorneys experienced with such hearings, only a brief opening statement may be needed, while a more detailed statement might be appropriate where a party appears without counsel.

At a minimum, the opening statement should include an identification of the IHO, the parties to the hearing and their representatives. If possible, the IHO should summarize the issue to be decided, at least as he or she perceives it, and should emphasize the impartial nature of the hearing. Administrative aspects of the hearing, e.g., smoking, recesses, etc., might also be briefly mentioned. If one or both of the parties are not represented by counsel, it would be helpful to review the procedures to be followed during the hearing. Presented below is an outline of a comprehensive opening statement which expands upon the major points suggested by the agenda for a hearing.

I. Opening Statement

A. Call to order

1. Statement of time, date and location of the hearing

2. Reference to part of regulations governing impartial hearings

3. Statement of the date on which the request for a hearing was filed and the dates and methods of notifying the parties regarding the schedule of the hearing

B. Purpose

1. Statement of issue

2. Identification of child, petitioner and respondent by name for the record

C. Introduction of IHO

1. State name

2. Describe role of IHO

a. To conduct the hearing in an orderly manner

b. To provide an opportunity for full presentation of testimony

c. To arrive at an impartial decision based solely on testimony and evidence presented during the hearing (evidence and testimony not known 5 days prior to the hearing may be prohibited).

D. Procedures

1. Statement as to whether hearing is open or closed. (If closed, IHO asks all individuals not a party to the proceedings to leave).

2. Statement of the order in which the parties will present evidence and testimony. (It is customary that the school district will start, followed by the evidence and testimony of the parents and witnesses).

3. Formal rules of evidence do not apply.

4. Statement that IHO will pose questions to any person attending the hearing as it is deemed necessary.

5. Development of the Decision

- o Rendering
- o Timelines
- o Mailing

E. Rights

1. Statement as to whether parents have been fully notified and given the opportunity to understand and to exercise their rights. This may include enumerating the rights of the parties, such as:

- o The right to counsel,
- o The right to present evidence,
- o The right to cross-examine witnesses of the opposing party,
- o The right to prohibit the introduction of evidence, the substance of which has not been disclosed to such party at least 5 days before the hearing,
- o The right of the parents to determine whether the child shall attend,
- o The right of each party to have a verbatim transcript available to them.

2. Statement regarding each party's right to appeal.

F. Introduction of parties for the record.

1. Request that each person state his or her name and position for the record. Attorneys should be requested to state their name, and their firm's name, address, telephone number.

2. Ask if any objections or motions are to be made.

3. Ask if either side wishes to make a brief opening statement. (Note: No questions should be asked prior to, during or after the party's opening statement).

RECEIPT OF FORMAL TESTIMONY

Opening Statements

Opening statements by the parties should be encouraged, since they summarize the issues and outline the positions of the parties allowing them to begin their presentation on a more formal, less stressful basis.

Order of Testimony

The school district has the burden of proof to show that it is meeting its responsibility to provide the child with a free, appropriate public education, including a proper classification and program placement. Therefore, the school district should be asked to present its direct case first with the parents allowed to cross-examine. Two additional reasons make this desirable. First, the school district has had more experience in presenting chronological overviews of cases and in presenting its evidence and witnesses. Second, parents, especially those without counsel, have a chance to see how the procedure functions. This would then be followed by the parents direct case and the testimony of their witnesses who can then be cross-examined by the Board representative.

Following the cross-examination, the hearing officer may ask the witness any questions he or she feels are necessary. It is entirely possible, of course, for redirect and recross-examinations after direct and cross-examination have been completed. If either party expresses further need of the witness, the IHO should ask the witness to remain to be called at a later time. If not, the witness should be dismissed.

Witnesses

All witnesses should sign in and a copy of that list should be provided to the parties, the IHO and the stenographer.

As each witness is summoned, the IHO should indicate where the witness is to sit, ensure that the witness is "sworn in" and then ask the witness to state his or her name, address, position, and relationship to the child. Administration of the oath to a testifying witness should always be on record along with the identification of the witness.

Where either party calls expert witnesses, the expert's qualifications should be set forth in direct testimony. If counsel for the party fails to do so, the IHO should extract enough information regarding the credentials of the witness to be satisfied that the witness is, in fact, qualified to give expert testimony.

Only parties to the hearing, their counsel (either an attorney or lay advocate) or the IHO may question witnesses. At any time, the IHO may interrupt the proceedings to stop overly hostile or irrelevant questioning.

Documentary Evidence

The admissibility of documentary evidence rests within the IHO's discretion, since formal rules of evidence, such as hearsay and best evidence, are not applicable to administrative hearings. Generally, all evidence is admissible except in the following circumstances:

1. Where a party to the proceeding objects because they have not received the evidence to be introduced five (5) days prior to the hearing. This rule is absolute and such evidence cannot be admitted over objection. The purpose of this rule is to prevent surprise and should not be taken to include evidence which, although not formally exchanged, is in the possession of both parties.

2. The evidence to be submitted is totally irrelevant in the opinion of the IHO, based on the objection of one of the parties.

Documentary evidence should be marked with numbers for board exhibits and letters for parent exhibits. It may be helpful for both parties to submit and mark evidence prior to beginning testimony. A list of board and parent exhibits should be completed before the hearing concludes and should be signed by both parties.

UNEXPECTED SITUATIONS

Not every hearing will proceed with a smooth flow from opening statement, through presentation of evidence, to concluding statements. The situation may change or things may happen which will draw upon creative hearing administration and problem-solving skills to achieve an appropriate outcome. Some of these issues are discussed below, with possible orders which a hearing officer may issue.

Canceling a hearing

Prior to the date of the hearing, either party may report that their position has changed and that there is no need for a hearing. Clearly, if both parties agree in writing that there is no longer an issue and an agreement has been reached, the matter becomes moot and the IHO should cancel the hearing. If, however, either party reports that there is still disagreement, the hearing must proceed as scheduled with the new issues clarified at the onset.

Going off the record

In the course of a hearing, it may become apparent that there is confusion as to the issue or a possibility of stipulations or a resolution of the case by mutual agreement. Nothing prevents the hearing officer from going off the record to meet with the parties, providing they agree to do so. If agreements regarding the issue or all or part of a resolution are reached, they should be indicted for the record along with the concurrence of the parties. If, however, such off-the-record discussions do not lead to any concrete results, no portions of the discussions should be repeated for the record.

Recesses

In the above situation, the IHO may feel that his or her presence might reduce the possibility of agreement. A recess might be called and the parties asked to discuss the matter.

Either party may request a recess for the purpose of talking privately with the IHO; however, discussions with one party should not be held unless the other party is present and can hear what is being discussed.

During the course of the hearing, either party or their respective counsel may become hostile or overly aggressive in attempt to discredit the other party or present their own case. The IHO may either go off the record or call a recess for the purpose of reminding both parties that the hearing will be conducted in an orderly fashion and that there is little room for such behavior in the hearing procedure.

Postponement

In the course of the hearing, a party may attempt to introduce new evidence that could significantly bear on the results of the case. Although the five-day rule of surprise would preclude immediate introduction of the evidence, a postponement of the hearing could be ordered to allow consideration of the evidence by both parties, particularly if it is of great value. Also, if both parties agree, this five-day rule may be waived in the interest of saving time.

In the course of the hearing, it may become apparent that an appropriate evaluation has not been conducted. Because a complete evaluation is central to determining a suitable and appropriate education, a postponement pending completion of a sufficient evaluation might be ordered. In rare cases additional supportive data might be introduced to supplement the tests in the original evaluation. The hearing officer may order that an independent evaluation be conducted, and, if so, the cost of the evaluation would be at public expense.

CONCLUDING THE HEARING

Once the parties have entered all their evidence and made brief closing statements, the IHO should make a closing statement including:

- o A statement that the parties have had full opportunity to present their cases,
- o Stipulations to which both parties agree,
- o The date for the decision and the parties' right to appeal,
- o The earliest date when the verbatim record will be available,
- o A time limitation on any memorandum of law,
- o Responsibilities for carrying out any special orders,
- o Appeal rights,
- o The time the hearing concluded.

The following checklist has been developed to assist the IHO with the conduct of the hearing. The use of a checklist will ensure that the myriad details associated with a hearing are completed. Similarly, it will serve as a valuable resource for the IHO when reviewing the completed hearing.

HEARING CHECKLIST

Description of Activity and Procedures	Check as Completed
1. Call to order; opening the record	_____
2. Introduction of:	
o IHO	_____
o Other persons present	_____
3. Opening statement by IHO	
o Purpose of the hearing	_____
o Rights and responsibilities of parties	_____
o Rules of order	_____
o Rules of evidence	_____
4. Opening statements by parties	
o By school district representative	_____
o By pupil representative	_____
5. Framing the issue(s) (by IHO)	_____

IHO NOTES:

6. Presentation of cases	by school district rep.	by pupil rep.
o Witness(es) called	_____	_____
o Evidence marked as submitted	_____	_____
o Direct examination	_____	_____
o Cross-examination	_____	_____
o Redirect examination	_____	_____
o Recross-examination	_____	_____
o Cases rested	_____	_____

7. Closing statements

o By school district representative	_____
o By pupil representative	_____

8. Closing statement by IHO regarding

o Summary of the issue(s)	_____
o Statement of stipulations agreed to	_____
o Availability of transcript	_____
o Date upon which decision will be provided	_____
o Rights of appeal	_____
o Date and time of adjournment	_____

IHO NOTES:

Presentation of Evidence and Testimony

Representative's Name, Title and Relationship to Child	Testifying at request of the school district's representative	Documentary Evidence presented and testimony notes

(ALL TESTIMONY SHALL BE GIVEN UNDER OATH OR AFFIRMATION.)

Presentation of Evidence and Testimony

Representative's Name, Title and Relationship to Child	Testifying at request of pupil's representative	Documentary Evidence presented and testimony notes

(ALL TESTIMONY SHALL BE GIVEN UNDER OATH OR AFFIRMATION.)

POST-HEARING ACTIVITIES

Making the Decision

Once the hearing has concluded, the IHO must begin to prepare the decision which must be rendered within 45 days of the date that the Board of Education received the request for a hearing or determined the need for a hearing by its own initiative. As a first step in this preparation, the IHO might review the legal, philosophical and educational purpose of the hearing as well as the parameters within which the decision must be made.

The impartial hearing has two major objectives:

- To ensure that the child involved has access to a free, appropriate, public education, including whatever special education and related services may be required to meet his or her individual educational needs.

- To ensure that the rights of the child, his or her parents and the public education agency are protected.

With these broad objectives in mind, the hearing officer must render a decision within certain defined parameters:

1. The decision must be based solely on the evidence submitted at the hearing; only those findings of fact and conclusions of law which result from the testimony and evidence presented at the hearing are relevant.

2. The burden of proof lies with the school district, and fiscal constraints on the district are not a valid consideration.

3. The proposals of the school system should be judged against the standard of appropriateness. Whether they are the best should not be at issue.

4. The decision should be presented in generic terms. For example, if the issue is program placement, the decision should cite programs rather than specific schedules or teachers, yet be sufficiently specific as to allow no doubts regarding implementation.

5. The decision should be supported by the content of the testimony and exhibits.

A "good" decision should also meet the standards set by these questions:

1. Does it resolve the issue as fully as possible?

2. Is it sufficiently specific as to avoid a potentially undesirable precedent or generalization in the district?

3. Does it describe the information on which it was based?

4. Is it defensible on appeal?

5. Are its strengths greater than potential weaknesses?

6. Are intent and means of implementation made as clear as possible?

After considering the legal and procedural parameters which will help shape the decision, the hearing officer should begin to review the record and evidence from the hearing. If not already begun, the hearing officer should assemble a complete file on the hearing. A well-organized, complete file will serve a two-fold purpose; it will both facilitate the IHO's review of the case and serve as a basis for any appeals on the decision.

To ensure a structured and complete review of the record, the IHO might consider a two-step process. First, the hearing officer should review the record to ensure compliance with due process requirements. The three suggested checklists, prehearing, hearing, and post-hearing, will greatly facilitate this essential step.

Next, the IHO will find it helpful to review his or her notes from the hearing and to reconstruct the hearing. Such a reconstruction will help to place issues within their proper context and will facilitate the examination and evaluation of evidence for relevancy and credibility. A possible outline for a reconstruction is shown below:

Hearing Reconstruction

- Petitioner's Issue
- Petitioner's Evidence

  Written — Source
  Oral — Source

- Respondent's Evidence

  Written — Source
  Oral — Source

Once the hearing has been reconstructed, a construction of the case or written decision begins. The case is constructed by attaching weight to the various portions of the record. Through the analysis of the hearing reconstruction the IHO makes a determination regarding each of the issues presented. The following pages provide a format for a written decision.

Hearing Officer's Finding of Fact and Decision

Case Number: _____ Date(s) of Hearing: _____

Date of Decision: _____

Student's Name: _____ Date of Birth: _____

Address: _____

_____

Current Designation of
Handicapping Condition: _____

Current Placement: _____

Petitioner's Name: _____ Respondent's Name: _____

Address: _____ Address: _____

_____ _____

Issue/Purpose of Hearing: _____

_____

Committee on the Handicapped Recommendation: _____

_____

COH Recommendation Upheld

COH Recommendation Reversed

Other: _____

_____

_____

Hearing Officer: _____

Name and Title of Persons Who Appeared (See Attached)

APPEARANCES

Name of IHO

Date

All persons providing testimony or representing either party are listed.

PARENT'S POSITION:

A brief summary of the parent's position is described.

DOCUMENTATION ENTERED INTO EVIDENCE (SEE ATTACHMENT A)

BOARD POSITION:

A brief summary of the Board's position is described.

DOCUMENTATION ENTERED INTO EVIDENCE (SEE ATTACHMENT B)

FINDINGS OF FACT:

ISSUES:

1. Evaluation

The IHO indicates any substantial evidence from either party which substantiates his or her decision regarding this issue.

2. Classification

The IHO indicates any substantial evidence from either party which substantiates his or her decision regarding this issue.

3. Program/Services

The IHO indicates any substantial evidence from either party which substantiates his or her decision regarding this issue.

4. Placement

The IHO indicates any substantial evidence from either party which substantiates his or her decision regarding this issue.

_____ School District

STATE OF NEW YORK: COUNTY OF _____ Case_____

_____

In the Matter of the Appeal of

Name of Petitioner

from the Decision of the Committee on the Handicapped concerning the placement of their child, _____

_____

IHO summarizes major findings and lists specific decisions regarding each issue.

PLEASE TAKE NOTICE:

Within 30 days of the receipt of this decision, the parent and/or Board of Education has a right to obtain a review by the Commissioner of Education under Section 4404 of the Education Law and Public Law 94-142 by filing a petition of appeal to the Commissioner. Failure to file the petition in a timely fashion will result in a waiver of the right to appeal this decision.

This decision rendered _____

_____
Impartial Hearing Officer

ATTACHMENT A

Parent Documentation Entered Into the Record

List evidence as submitted into the record. Exhibits lettered A, B, C, etc. as entered on the record.

ATTACHMENT B

Board of Education Documentation Entered Into the Record

List evidence as submitted into the record. Exhibits numbered 1, 2, 3, etc. as entered on the record.

PART III: USE OF EVIDENCE

Introduction

The submission and use of evidence is usually not a problem for the IHO. Each party has the right to thoroughly examine and question the source, credibility, accuracy, relevancy and purpose of the evidence submitted and used by the other party. The IHO should neither receive nor examine any evidence prior to the hearing. Both the parents and school district should, however, submit to each other copies of all evidence which each intends to use in the hearing five days prior to the hearing. Failure to comply with the "five-day rule" could result in postponement and rescheduling of the hearing.

The IHO must remember that the "burden of proof" in the case is upon the school district. It is the school district which must justify its actions, not the parents.

Formal Informality

The IHO must make every effort to hear testimony and to receive evidence in a relaxed but orderly and efficient atmosphere which is controlled by the IHO and not by either of the parties or their witnesses. As Louis J. Naftalison states in the Manual for Hearing Officers in Administrative Adjudication in the State of New York:

> "Informality is not inconsistent with orderliness and only means an absence of unnecessary and time-consuming technicalities. It provides flexibility, enabling adjustment to various conditions and circumstances ... dignity and decorum ... a relaxed and placid atmosphere which is conducive to the free flow of information." (p. 43)

Instead of formal legal rules, the impartial hearing process allows for the introduction of all pertinent evidence which is then examined and weighed by the IHO. These procedures, known as "relaxed rules of evidence," are rooted in the following philosophy:

- There is no jury to be convinced although one has to be ever mindful as to what grounds and reasons might cause an IHO decision to be overturned by the Commissioner or courts. At this point, however, the IHO is regarded as competent to consider all evidence and to decide what is relevant and important.

- It is difficult to dismiss evidence before it is heard, received or examined. The caution is not to be afraid to hear too much irrelevancy but rather to allow space to hear that which could be relevant.

- Emotional ventilation or "getting it off one's chest" can be important and therapeutic for those involved or who will be involved in an ongoing relationship. This need may manifest itself in the presentation of irrelevant, incomplete or undocumented evidence that is not sequenced chronologically.

- Refusal to hear or receive evidence may intensify the problem, promote an appeal to the next level, give cause for the Commissioner to dismiss or overturn the decision and damage the credibility of the process as well as that of the IHO.

Degrees of Proof

How is the IHO to measure proof? What yardstick or standard is used to determine if each party has met its responsibility? Generally, administrative hearings are decided on the basis of "substantial evidence." Substantial evidence cannot be defined precisely, but rather must be described in more general terms. For example, an administrative decision will be upheld if, on the entire record, the determination is rationally supportable, i.e., could have been arrived at reasonably.

The courts have described substantial evidence as the kind of evidence that furnishes a substantial basis of fact, from which the matter at issue can be reasonably inferred. Substantial evidence is of relevant consequence and implies a quality of proof which induces conviction and makes an impression on reason.

Because the burden of proof is on the school board to show that its action is appropriate, its presentation must meet the test of substantial evidence for the action to be upheld.

Relevance and Materiality

Generally speaking, the IHO should react negatively to the claims of irrelevancy and/or immateriality simply because of the liberal nature to be taken toward acceptance of evidence as discussed above. The following are terms frequently used:

- Relevance - if the evidence tends to prove or disprove fact which is central to the issue(s) of the case.

- Materiality - if the evidence seems to be of considerable importance or influence to the issue(s) and/or merit(s) of the case.

Irrelevant or immaterial evidence is usually accepted in a hearing except when its presentation tends to be an imposition on the time and patience of all involved.

Best Evidence

This concept often applies to the availability of written documents and holds that there really is no substitute for the credibility of an original document in contrast to the availability of a supposedly exact duplicate. Where objection is made to the introduction of evidence of a "secondary nature" on the grounds that it is not the best evidence, the original document should be produced unless it is shown, for reasons satisfactory to the IHO, that it is not necessary or that it is unavailable.

Reproductions of original documents should satisfy as best evidence unless the authenticity of the purported original document is significantly in question by the opposing party or by the IHO. Without adequate explanation, failure to produce a more reliable form of evidence, such as the original document, should be recognized as having less weight and may be regarded as adverse evidence. For the most part, however, the IHO and the parties will find that reproductions of written evidence are acceptable.

Hearsay Evidence

Hearsay evidence is evidence which, either orally or in writing, seeks to establish a fact based not upon the witness' own personal knowledge or observation, but upon what someone else said.

Hearsay may include rumors and gossip, as well as other forms of second-hand information. Although hearsay may be held inadmissible in court, it may be admitted in an administrative hearing for what it is worth. It may, for example, provide the hearing officer with leads upon which to base questioning. Similarly, it may provide the IHO the opportunity to bring in, by notice or subpoena, the alleged source of the hearsay statement. There is nothing improper about the introduction of hearsay evidence in an administrative hearing as long as the decision is supported by substantial legal evidence.

The best case, however, is the one in which all witnesses are present to give their own testimony. For a variety of reasons, e.g., illness, scheduling problems or fear of reprisals, a witness may not attend the hearing. In such a situation, the party ought to have the witness sign an affidavit containing the substance of the presentation. Even then, the IHO must use great care in evaluating the relevancy and accuracy of that evidence before using it in any manner.

Direct and Cross-Examination

"Direct examination" is when the party asks questions of his or her own witness.

"Cross-examination" is when one party asks questions of a witness who is appearing for the other party. This process is a right and not merely a privilege.

In both situations the IHO must not allow two circumstances to occur:

1. Leading questions which suggest a specific answer.

   Example:

   Wrong: This question suggests a "yes" answer.
   "Don't you think he or she was wrong in saying ...?"

   Correct: This question leaves the answer up to the person being addressed.
   "Do you think he or she was right or wrong in saying ...?"

2. Intimidation.

Example: Wrong: The witness is urged to answer because he or she is warned of reprisals and not of his or her free will.
"Now, I want you to tell the truth or you know what will happen ..."

Correct: The witness answers at his or her own free will without fear of reprisals.
"Just state what you saw or heard."

Neither direct nor cross-examination should be allowed if:

- o The question(s) is not related to the issues of the case.
- o The witness does not have the knowledge or the competency to answer questions in areas which he or she could not possibly be a specialist.

  Example: "Do you think a child psychologist would agree with that action?" is inappropriate unless the person is a child psychologist or perhaps a specialist in the field of psychology or psychiatry.

- o The questions are intimidating or there is evidence that the witness has been intimidated already.
- o The questions are leading.
- o The questions are repetitious.

Raising Objections

If either party or their counsel objects to testimony or evidence as presented, the IHO must ask the person to state her/his objections with clear and logical reasoning:

- o Why the question should not be answered.
- o Why the answer, if already provided, should be disregarded.
- o Why the evidence being offered ought to be excluded from any consideration by the IHO.

Grounds or reasons for objections are based on lack of "best" evidence, falsification of evidence, the irrelevancy of evidence or testimony to the case and evidence of intimidation. Remember:

- o The burden of proof on the objection rests upon the party making the objection.

- o The IHO may decide whether or not to:
  - accept the objection
  - reject the objection
  - reserve judgement until later.

These three alternatives can only be chosen after the objections have been heard. The IHO should neither negotiate nor argue the merits of either the reasons for the objection nor his or her choice of alternatives.

Example: IHO: "Excuse me for interrupting, but I have heard your reasons for objection and have made my decision which is ... There is no reason to discuss this matter any more. The hearing will continue."

Even though special education hearings are not specifically covered, this readable text adequately and applicably treats the topic of evidence in a manner which the nonattorney will appreciate. A key to this subject is for the IHO to remember, as well as to remind the parties and their attorneys, that the special education hearing is not bound to the strict rules of evidence as is the case in a court of law.

PART IV: IHO QUALIFICATIONS, SKILLS AND INFORMATION

Qualifications of the Hearing Officer: An effective hearing officer must possess a number of qualifications. One needs to have a knowledge base as well as personal skills in order to function within the hearing process. Listed below are some general criteria:

I. Knowledge. This area includes knowledge of both Federal and State law and regulations as well as knowledge of special education concepts, definitions, policies and procedures. The practicing hearing officer should have:

- o An understanding of the historical background including the purpose and mandate of P.L. 94-142.
- o An understanding of the basic principles of due process, including the rights of all parties to the hearing.
- o An understanding of both the State law and court rulings as well as Part 200 of the Commissioner's Regulations, Commissioner's decisions and other informational bulletins provided by the New York State Education Department.
- o A knowledge of the definitions used for handicapping conditions.
- o A knowledge of the programs and services available to handicapped children.
- o A general knowledge of standard diagnostic tools of assessment as well as a general understanding of special education terms.
- o A basic working knowledge of the following educational concepts and processes:
  - free appropriate education
  - least restrictive environment
  - the Committee on the Handicapped process
  - individualized education program
  - nondiscriminatory testing and evaluation
  - confidentiality of information.

II. Administrative Skills. The hearing officer must be able to:

- o Effectively structure and conduct a hearing to obtain all the pertinent facts of the case.
- o Insure equal participation by the parties and prevent intimidation.
- o Allow each party a full and complete opportunity to explain their position in the process and clarify their position.

- o Make sure that each party has complied with the rules of the hearing,

- o Stay within jurisdictional bounds in conducting the hearing and writing the decision.

III. General Skills and Qualifications. Generally, the hearing officer must have:

1. Judicial temperament and poise.

2. Patience and tact.

3. Ability to exercise sound judgement and discretion.

4. Ability to be objective, free from influence of any kind.

5. Ability to approach the hearing with open mind, without bias or prejudice and without prejudgment of the issues.

6. Knowledge of the laws, rules, regulations, procedures and precedents affecting the functions of the agency served, and an ability to interpret fairly such laws, etc.

7. Ability to preside at and control hearings with dignity and decorum.

8. Articulateness in making oneself understood in simple language by all persons at hearings, through pertinent, fair and comprehensible interrogation and comment.

9. Ability to analyze and evaluate testimony and other evidence.

10. Ability to determine credibility of witnesses from the quality of their testimony and evidence and by observing their demeanor.

11. Ability to write clearly and concisely in simple, comprehensible language.

12. Absolute impartiality and an aura of impartiality.

13. Good common sense in dealing with persons and issues.

FACILITATING COMMUNICATION

A primary task of the *IHO is to gather factual data from candid and complete* answers to questions asked of the various parties. In order to accomplish this, the IHO must recognize that he or she may facilitate communication through:

- o Confidence in the proceeding.
- o Familiarity with relevant data including law and regulations.
- o An attentive attitude.
- o An organized manner.
- o Patience.
- o Openness and acceptance of needs.
- o Acceptance of others' life values and philosophies.

These factors will be of value when participants might:

- o Feel generally nervous, uncomfortable, or even embarrassed.
- o Feel intimidated by the hearing process.
- o Feel intimidated by other parties present.
- o Feel intimidated by the IHO.
- o Fear witness testimony and information disclosure.
- o Fear personal attack.
- o Fear the final outcome as much as the process itself.
- o Be concerned with time, money, and other issues which may or may not be related to the case.
- o Be concerned in presenting herself or himself in a favorable light.
- o Attempt to persuade the IHO of the merits of the case while perhaps even discrediting the information, testimony, or witnesses of the other side.
- o Attempt to achieve any number of goals unrelated to the purposes and objectives of the hearing process.
- o Lack information that is being sought by the other party.

Seven basic concepts emerge from a consideration of the above listing.

Concept One: The IHO must always be consciously aware that he or she must facilitate communication for the transmission of complete and accurate information.

Concept Two: The IHO must be aware of how his or her presence is being perceived and how it is affecting the flow of information.

Concept Three: The IHO must be aware of the opinions he or she has and whether or not there is a factual and relevant basis for them.

The initial appearance of the IHO is important in projecting authorized and competent professional informality. An objective yet concerned demeanor is important at the initial contact with the parties, during the opening statement and throughout the entire hearing.

Some questions a hearing officer should consider are:

- Can I be considered as trustworthy, dependable, competent, and consistent?
- Can I be expressive enough as a person to be understood without ambiguity?
- Can I let myself experience and express warmth, concern, interest, and professional objectivity?
- Can I be strong enough to be objective in decision making?
- Can I try to see things as others see them and appreciate their position, yet remain impartial?
- Can I be sensitive and accepting yet avoid premature evaluation?
- Can I approach each situation without being bound by previous experiences?

Concept Four: The IHO must consider whether the question, and the manner in which it is asked, will further or inhibit the flow of the hearing.

While there are many approaches to questioning, the three-stage process has proved to be effective:

I. <u>Preliminary Problem Identification</u>

This stage allows the party to describe in general terms the nature of the problem and the remedy being sought. Ventilation of emotion during this time is very common. To help the party feel at ease, the IHO should encourage the party to describe the circumstances in an informal manner,

generally an uninterrupted free flowing narrative. The IHO will then allow the respondent to reply. The IHO gains a general knowledge of the case through the presentations of each of the parties.

II. Chronological Overview and Clarification Stage

During this stage the IHO encourages an orderly and sequential narrative of the events — when the problem began; who was involved; who did what, when and how; what, if any, attempts were made to resolve it; what evidence and/or witnesses can be introduced.

III. Theory and Verification Stage

In this particular phase, the IHO will have to assume the responsibility of developing one or more positions on the case and applying the law and Commissioner's regulations. To do this adequately the IHO has to determine the validity of statements and information while also acquiring enough information to determine the real truth of any disputed relevant fact. This phase of the hearing process, more than any other, requires careful and deliberate questioning.

The following considerations are helpful in this process:

- The IHO should be aware that he or she is in a position to ask questions.
- The IHO should consider the questions he or she is about to ask and weigh carefully the desirability of asking them.
- The IHO should examine carefully the various forms of questions available and the types of questions he or she personally intends to use.
- The IHO should consider alternatives to asking questions.
- The IHO should be sensitive to the questions which the interviewee is asking — whether he or she is asking them outright or not.

It is very easy to differentiate between the open question and the closed question. When to use each must be a purposeful choice. The open question allows the interviewee full scope and solicits views, thoughts, opinions, feelings and even motives. The closed question usually demands specific fact. There is a proper time to use both forms.

a. Open: Why did you acquire an independent evaluation of your child's educational achievement level?

b. Closed: Were you or were you not dissatisfied with the school's psychological evaluation of your child?

Example (b) is very specific. In the early part of a hearing it may be inappropriate to ask since it could prevent the disclosure of additional and

needed information, such as professional competency or credible testing procedures. On the other hand, if a parent is floundering or too timid to state why he or she acquired an independent evaluation example (b) might be very necessary before additional questions can be asked. Example (a) on the other hand encourages full disclosure to the degree of providing more information than intended.

Whereas closed questions are usually direct, open questions can be asked indirectly as if such were statements and not questions at all.

a. Indirect: You find it inconvenient to have a child with Johnny's handicap in your classroom.

b. Direct: Do you find it inconvenient to have a child with Johnny's handicap in your classroom?

Again, example (a) as a summary statement allows and encourages further elaboration — perhaps from fact to feeling. Example (b) could encourage a single word answer or at least confine the answer.

Double questions often confuse and confine the interviewee. If one asks, "Do you like coffee or tea?", this suggests only one answer can be correct. If one asks, "Do you want coffee or tea?", the question indicates that another choice, such as milk, is unavailable. It is the confusion that is caused by the double question that is of concern to the IHO. If responses are sought to two or more questions, it is better to ask each separately.

The leading question is obvious when asked and it should be avoided. The following is an example:

Wrong: You didn't really want Mary to live at home, did you?

Right: How do you like having Mary living at home?

Concept Five: The language the IHO uses must be understandable to the parties, particularly when the IHO is asking a question.

The IHO is not at the hearing to impress the parties present with specialized knowledge such as, "94-142 specifically states..." If the IHO does not understand what a party is saying or believes that others present may not understand, the IHO should ask for clarification or a restatement, not merely a repeat, of what has already been said. This is particularly important when "expert witnesses" are used. Parents or the IHO may not be familiar with "minimal brain dysfunction" or the "Thematic Apperception Test." In such cases it is proper to take the time for inquiry. Following are some sample questions:

IHO: How would you describe the purpose of this test?
How is it administered?
Would you please explain interpretations of the various score ranges?

What does Helen's score become, once interpreted?
Is this test widely used?
How much experience have you had in administering this test?
How much experience have you had in evaluating test results?
What other tests could be used for the same purpose?
Explain why you used this particular test?

Even if the IHO is aware of the right answers to each of the questions asked, the answers to be provided accomplish at least two objectives:

- o Testing the credibility of the witness,
- o Educating those at the table who may be unfamiliar with the test.

The above systematic technique is called probing, and it can be used effectively to acquire responses from reluctant or nervous parties.

Concept Six: The IHO must be an active listener.

Listening is the active process of being involved with what is said, not simply hearing sound. The IHO's assurance to all parties that they have been listened to and understood — not merely heard — will assist the parties to trust the process, to have confidence in the IHO and to accept the final decision as just. The purpose of active listening is to provide nonjudgmental understanding and thereby stimulate full participation by the parties. Its purpose is to help the parties feel free to discuss and reflect upon the facts, circumstances and merits of the problem in a comfortable and open manner. The employment of active listening is needed to gain information without intimidation or manipulation. Active listening is the process of picking up the party's message and sending it back in a reflective statement which mirrors what the IHO has heard and understands. The following is an example:

COH: "I'm not at all convinced that it is the best use of the available taxpayers' monies allocated to this school system to put this child in private placement."

IHO: "I fully appreciate the fiscal burdens of the school system and of the taxpayers. Would you please do two things for me? First, describe to us the purpose of the special education law and second, tell whether or not you think this child was meant to be covered by it."

COH: (Responds with an accurate description of the law and concedes that the child's needs could appropriately be met by private placement). "But we are talking about a lot of money for one child!"

In the above example the IHO displayed concern with the COH Chairperson's worries, but then redirected the attention to the law, the merits of the case and the district's responsibility to administer the law — all in a courteous and nonjudgmental manner.

The active listening response differs from the passive response in important particulars. By reflecting back what has been heard, the active response explicitly communicates that what the party said was actually heard and understood, and perhaps even felt.

Passive responses, such as "Mm-hmm," and "continue," at best can only imply that words have been heard and not whether the message has been accurately and clearly understood. Insofar as the empathetic ideal of nonjudgmental acceptance is concerned, active responses are probably more effective than passive ones. The active listening response can be used to mirror both content and feeling without damage to the IHO's credibility and impartiality. The IHO can say, "You are angry and I understand," without agreeing with the party or blaming other parties. Being an active listener, however, does not mean that the IHO must dominate or continually interject statements.

Concept Seven: Silence can be effectively used if employed deliberately and appropriately.

A simple gesture on the part of an IHO may convey a message without interruption of what is being said. As a deliberate response, silence implies the IHO has decided to do nothing, regarding this as the most helpful thing he or she can offer at this time.

STIPULATIONS

Introduction and Clarification

While mediation is not mandated in the provisions of due process for special education appeals by either Federal or New York State law, Federal law does encourage its use to resolve such disputes equitably. Available statistics indicate that approximately 5% of the cases in the hearing process in New York are resolved through agreement by the parties to "stipulations." It is not known, however, how many instances of disputed evidence, misinterpretation of data, and waivers or variations of the hearing process are resolved informally in a similar manner.

Stipulations can be developed without the active participation or presence of the IHO. Representatives of the parties can simply meet outside the hearing to negotiate a mutually agreed upon settlement. So long as the substantive agreement does not violate the rights of the child, is in compliance with all laws and regulations and is agreed in full by the primary parties, it may be stipulated. The negotiation and resulting stipulation can occur prior to the scheduled hearing or it can occur within the hearing through recess, adjournment, and/or off the record discussions. The IHO could conceivably call a recess in the hearing to allow the parties to explore the possible development of stipulations.

The parties will look to the IHO, either to approve or reject proposed stipulations. If the stipulation is approved, it is similar to a consent decree.

- The IHO should accept a stipulation as tentative until he or she reviews it to be sure all aspects of it are legal and do not violate either the rights or best interests of the child. This review should be completed in the same time frame as the decision process.

- The IHO should either approve or disapprove the stipulation in its entirety. He or she should not make modifications.

- If the stipulation is disapproved, specific reasons should be stated and the hearing reconvened without prejudice to either party and without regard to "previous offers of settlement."

Perceived Advantages of the Stipulation Process

- It may bring about an expeditious case resolution.

- It is an effort to develop or maintain a cooperative working relationship between parties.

- Reflection upon the case may show that the distance between positions is not as great as was once believed.

- Both parties may prefer a settlement of their own making in contrast to having to abide by somebody else's decision, particularly if it is believed the case decision by the IHO could go either way.

- Most of all, it is perceived that the primary interest of the child can best be served through the stipulation process which has a real sense of retained ownership, involvement and jurisdiction as shown above.

Role Functions and Dynamics

If stipulation is attempted, the IHO should expect a possible ventilation period by one or both the parties. Rather than argue the merits of their own position they may attempt to discredit the proposals of the other side as being insensitive, impractical, unrealistic or illegal. It may be necessary to agree upon some basic ground rules such as:

- One person talks at a time.

- No interruptions.

- No personal attacks.

- All discussion will be issue-centered with proposals for solution.

Patience is required. Productivity in such cases will occur only if solutions are sought.

The IHO facilitator will have to perform the functions of:

- o Issue focusing.
- o Clarifying information.
- o Summarizing proposals accurately and clearly.
- o Reality testing.
- o Floating and exploring possible alternatives.
- o Obtaining closure on solutions.
- o Acquiring specifics regarding what is to be done, by whom, when, where, frequency, quantitative factors, and all other terms and conditions.
- o Discouraging admissions of wrongdoing, apologies, and explanations of the reasons for stipulation.
- o Pointing out the possibilities that occur when noncompliance or allegations of such renew the dispute. Further dispute resolution clauses often prove to be beneficial.
- o Giving the parties a clear understanding that the IHO intends to review the stipulation and to give a determination within the same time frame as mandated in the hearing de[illegible]ion process.
- o Acquiring signatures.

Of the above items, two require some elaboration.

1. Reality Testing

What makes sense to one party may make no sense to the other party even if the proposal is clearly understood. The reluctant or refusing party may, for example, doubt the practicality ("workability") of the proposal or simply prefer something else, something more.

In order to maintain both real and perceived impartiality, the IHO must be cautious not to argue the merits of the proposal, even objectively. Instead the IHO must ask value-free questions so that each side can:

- o Rethink the merits of their own position.
- o Evaluate the possible advantages/merits of the other's proposals.
- o Consider the practicality of the proposal(s).
- o Candidly evaluate the other's resistance and see if it holds some merit.

- Evaluate the cost of nonsettlement.

These purposes are fulfilled through the art of persuasion and dissuasion and not negotiations by the IHO.

Acceptable IHO Approach:

- "Why do you think the other side is resistant to your proposal?"
- "Why do they say you are unrealistic? What reasons would they have to offer?"
- "Do you think you are realistic? What reasons would you offer?"
- "What do you see as alternatives?"
- "What happens if you don't settle? Think about it."

Separate caucuses may be necessary to accomplish reality testing successfully. The employment of this technique is best used when the IHO first begins facilitation for stipulation thus avoiding suspicion by an announcement or implementation in the middle of the process. A caucus should be kept brief (10 minutes). Confidentiality of information must be respected unless permission to use such information is explicitly expressed. The caucus technique, of course, should be "off the record" as should the entire stipulation process. The caucus technique should not be overused, for the most durable settlement is one which is formed through joint efforts of the parties in joint session.

2. Floating Alternatives

The IHO cannot maintain impartiality if he or she becomes a party-by-default to the dispute or develops a perceived overzealous interest in the stipulation. The IHO must be ever mindful that if the stipulation process is not successful he or she indeed will have to make a decision, a decision without regard to:

- What is "fair."
- What will be acceptable to the parties.
- Prior offers of settlement/stipulation.
- Prejudice or favor to any party due to occurrences in the stipulation process.

An appropriate way to "suggest" stipulation factors for consideration is to utilize the interrogatory approach:

- "Have you ever considered...? Well, what do you think?"
- "What would happen if...?"

In summary, refrain from directly suggesting anything. Plant the thought and nurture it by asking the participants to consider additional nonvalue-laden questions. Refrain from answering your own questions, providing your own thoughts and advice, even if asked, and negotiating your view with theirs.

GLOSSARY OF TERMS

Credibility of Witnesses and Weight of Testimony

A glossary of terms from the Manual for Hearing Officers in Administrative Adjudication is provided below:

General: Credibility of witnesses, the effect and weight of conflicting and contradictory testimony is a question of fact.

Disbelief of Entire Testimony: It is permissible for the trier of the facts to disbelieve the entire testimony of a witness who willfully testifies to a falsehood as a material fact.

Weight of Testimony: The weight of testimony on any issue is on that side of the issue on which the evidence is more credible. This is not materially different in meaning from preponderance of evidence. Neither the number of witnesses, nor their station in life, nor their titles or positions, are controlling. The testimony of a single witness, if credible, may be sufficient to establisn any fact in a civil action.

Interested Witnesses: The testimony of a witness who is interested in the outcome of the action or in any party, may be disbelieved, although it is not otherwise impeached or contradicted.

Disinterested Witness: A disinterested witness is not entitled necessarily to any more credit than an interested witness. As with interested witnesses, it is a matter of credibility. His or her lack of interest in the outcome may be considered in weighing the credibility of his or her testimony.

Contradicted Testimony: It is a matter of giving proper weight to testimony when the testimony of a witness is contradicted by herself/himself or other witnesses.

Uncontradicted Testimony: Positive testimony of an uncontradicted witness should not be disregarded arbitrarily. However, the fact that testimony is uncontradicted, does not make it acceptable, without question, per se.

Improbable or Incredible Testimony: Where testimony is extraordinarily in conflict with probability or inconsistent with reason and intelligence, it may be rejected, even though uncontradicted.

Definitions

Evidence is the legal term which covers all of the information and facts adduced in a case, be it testimony of witnesses, or documents or other objects identified by witnesses, or otherwise admissible and presented to the court to prove or disprove the facts in issue. Evidence is the medium of proof.

Proof is the effect of result of evidence in convincing the mind of the trier of the facts. It is the conclusion arrived at by a consideration of evidence.

Testimony is the oral part of evidence consisting of the statements of witnesses made under oath.

Fact and Circumstances

A fact is what a witness has seen, heard, smelled, felt or tasted (the five senses). The general rule is that a witness must speak of facts alone. He or she may not utter opinions, conclusions or inferences.

Circumstances are collections of facts.

Inferences may be drawn from facts and circumstances. Inferences are reasonable deductions or conclusions flowing logically from facts which have been proved.

Conclusions are statements a witness makes and believes but does not actually witness or know of her or his own knowledge. They may be based on two or more separate facts. Only an expert witness can "conclude," and then only within an area of his or her expertise; a hearing officer "concludes" as to facts and law.

Kinds of Evidence

Direct evidence is proof of the facts in issue, communicated to the trier of the facts by witnesses, having actual knowledge of them by means of their senses. It is that evidence which, without inference or evidence of any other facts, tends to establish directly a fact in issue.

Circumstantial evidence is proof of collateral facts, where circumstances are shown, from which the inference may be drawn that the principal or essential facts are true and existed, in such a way that the proof is irreconcilable with any other theory that can be presented. Circumstantial evidence may be good evidence and should not be ignored.

Documentary evidence consists of writings, instruments, inscriptions and documents of all kinds.

Real evidence is evidence of which the trier of the facts acquires knowledge by personal observation and inspection of a thing or object to which the testimony refers. It may be a physical object, inspection of premises or exhibition of parts of the body.

Note: If real evidence is received, it should be minutely described on the record.

Pictures, photographs, snapshots, moving pictures which are true and authenticated representations, also x-ray plates (which are authenticated by a professional witness) are admissible.

Diagrams and Models which are explained by a witness knowing how they are made and what they represent.

Note: Diagrams may be made in the course of a hearing by a witness, who is qualified to make them. The witness is subject to cross-examination, if the diagrams are challenged as to reliability or relevancy.

Maps, either official or made by a witness before or during a hearing. In the latter event, the witness is subject to cross-examination, if the maps are challenged as to reliability or relevancy.

Positive evidence is proof that a certain fact does exist or did exist. Usually positive evidence as to a particular fact is considered stronger in weight than negative evidence as to the same fact.

"Prima facie" evidence: (The Latin phrase, "prima facie" literally means "at first view"). Prima facie evidence is evidence, which, on its face if unexplained or uncontradicted, establishes a fact alleged, or raises a presumption of fact.

INFORMATION CHECKLIST

SINGLE COPIES of the items which are listed on this checklist are available at no cost from the Office for Education of Children with Handicapping Conditions. To receive a copy of any of the items listed below, list the items which you would like to receive, write your name and address and return to:

New York State Education Department
Division of Program Development
Room 1071, Education Building
Albany, New York 12234

Laws and Regulations

___ 1. Article 89 of the Education Law (revised August 1984)

This section of the State Education Law spells out the educational responsibilities of local school districts and the State Education Department to handicapped children. It includes Chapter 853 of the Laws of 1976, Chapter 470 of the Laws of 1977 and subsequent revisions and additions.

___ 2. Article 81 of the Education Law (effective July 1, 1981)

The State law governing the education of children residing in child care institutions including handicapped and nonhandicapped.

___ 3. Section 112 of the Education Law (revised June 1980)

This section requires the State Education Department to set standards of instruction and personnel qualifications for teachers of children in the residential care of any State department or agency or political subdivision.

___ 4. Part 200 of the Rules and Regulations of the Commissioner of Education

The State regulations for the education of children with handicapping conditions, effective July 1, 1984.

___ 5. Part 116 of the Rules and Regulations of the Commissioner of Education (revised September 1984)

These regulations establish educational programs and services for children in full-time residential care in homes or facilities operated or supervised by a State department or agency or political subdivision.

___ 6. Chapter 462 of the Laws of 1984

Provides for planning and referral services for handicapped students reaching age 21 who are in nonresidential placements but are receiving special education services one hundred per centum of the school day.

___ 7. Chapter 570 of the Laws of 1983

Provides for planning and referral services for handicapped pupils reaching age 21 who are in residential in-state placements and will no longer be eligible for educational funding.

___ 8. Chapter 544 of the Laws of 1982

Provides for planning and referral services for handicapped pupils reaching age 21 who are in residential out-of-state placements and will no longer be eligible for educational funding.

___ 9. Chapter 947 of the Laws of 1981

Amends mental hygiene law, social services law, executive law, the Family Court Act and Article 81 of the Education Law in relation to residential treatment facilities.

___10. Chapter 721 of the Laws of 1979

This State law relates to the education of children residing in intermediate care facilities for the mentally retarded.

___11. Chapter 66 of the Laws of 1978

This State law relates to the education of children residing in facilities of the Department of Mental Hygiene.

___12. Chapter 410 of the Laws of 1978

This State law relates to educational services for autistic children.

___13. Public Law 94-142

This Federal law mandates the education of all handicapped children and requires due process procedures, Individualized Education Programs and other safeguards which protect the educational rights of handicapped children.

___14. Public Law 98-199

A Federal law which amends and extends P.L. 94-142. Effective December 2, 1983.

___15. 20 U.S.C. Sections 1401-1461

The full Education of the Handicapped Act as amended by P.L. 94-142 and P.L. 98-199.

___16. Final Regulations on Public Law 94-142, Federal Register, August 23, 1977

These regulations establish procedures to implement P.L. 94-142 at the State and local level.

___17. 30 C.F.R. Part 300

Assistance to States for Education of Handicapped Children, the August 23, 1977 Federal Regulations as renumbered and amended.

___18. Section 504 of the Rehabilitation Act

Nondiscrimination under Federal grants and programs.

___19. Final Regulations on Section 504 of the Rehabilitation Act of 1973, Federal Register, May 4, 1977

These regulations establish procedures relating to nondiscrimination on basis of handicap and program accessibility.

ANNOTATED BIBLIOGRAPHY

LEGAL BACKGROUND

The following citations represent the basic statutes and regulations related to the education of children with handicapping conditions. Although reprints are available for many portions of law and regulation, it is suggested that the original text, e.g., Education Law, decisions of the Commissioner, etc., be consulted if needed for a decision. The dynamic nature of the law and regulations may render reprints obsolete quite quickly.

McKinney's Consolidated Laws of New York. Education Law. St. Paul, MN: West Publishing Co. 1980.

A five-volume set containing New York State law relating to education. Article 89 of the Education Law presents specific provisions relating to the education of children with handicapping conditions. The entire five-volume set may be purchased or may be reviewed at law libraries and many public libraries. A reprint of Article 89 is available from the Bureau of Program Development.

Official Compilation of Codes, Rules and Regulations of the State of New York. New York, NY: Lenz and Riecker, Inc. (annual subscription). Title 8: Education.

A two-volume set containing rules and regulations of the Board of Regents and the Commissioner of Education. Part 200, contained in Volume A, contains the major provisions dealing with the education of children with handicapping conditions. Reprints of Part 200 are available from the Bureau of Program Development.

Judicial Decisions of the Commissioner of Education. Albany, NY: New York State Education Department. (annual)

Education For All Handicapped Children Act (P.L. 94-142)

Contains the primary Federal legislation dealing with education for children with handicapping conditions. Numerous sources, including the Bureau of Program Development, can provide reprints of the Act. Individuals with access to the United States Code should refer to volume 20, section 1401 et seq.

Regulations Implementing P.L. 94-142

The bulk of the implementing regulations are found in Title 34 of the Code of Federal Regulations, Part 300 et seq. Copies of the Code are available at law libraries and major public libraries. Reprints of 45 CFR 121a-m, the original regulations, are available from the Bureau of Program Development. The reprints, although dating from the August 23, 1977 Federal Register, are still relatively current.

HEARING OFFICER SKILLS

Due Process in Special Education: A Step by Step Resource Manual for Hearing Officers. Washington, D.C.: National Association of State Directors of Special Education, 1978.

A basic text for hearing officers in special education. The publication presents step-by-step procedures in preparing, conducting and writing the decision resulting from the hearing.

Assessment in Special and Remedial Education, by John Salvia and James Ysseldyke. Boston, MA: Houghton Mifflin, 1981.

A basic reference on testing techniques and usage, with emphasis on special education.